CONNECTICUT
LEGAL
RIGHTS
PROJECT, INC.

TESTIMONY OF KATHLEEN FLAHERTY, ESQ.
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PUBLIC HEALTH COMMITTEE PUBLIC HEARING
FEBRUARY 22, 2017

SB 326 (COMM): AN ACT CONCERNING ACCESS TO MEDICAL RECORDS AND THE FEES CHARGED FOR MEDICAL RECORDS. **SUPPORT, WITH CONCERNS**

Senator Gerratana, Senator Somers, Representative Steinberg, and distinguished members of the Public Health Committee:

Good afternoon. My name is Kathy Flaherty and I'm the Executive Director of Connecticut Legal Rights Project (CLRP), a statewide non-profit agency that provides legal services to low income adults with serious mental health conditions. CLRP was established in 1990 pursuant to a Consent Order which mandated that the state provide funding for CLRP to protect the civil rights of DMHAS clients who are hospitalized, as well as those clients who are living in the community. I'm also the Vice Chair of the Keep the Promise Coalition (KTP). KTP is a coalition of KTP is a coalition of advocates (people living with mental health conditions, family members, mental health professionals and interested community members) with a vision of a state in which people with mental health conditions are able to live successfully in the community because they have access to housing and other community-based supports and services that are recovery oriented, person-driven and holistic in their approach to wellness. Lastly, I'm a member of the steering committee of the Connecticut Cross Disability Lifespan Alliance (an alliance of people of all ages with all disabilities who pursue a unified agenda).

CLRP supports the proposed changes regarding access to medical records in SB 326, with concerns and suggestions for improvement in the language. The existing statute, C.G.S. §20-7, does not apply to "any information relative to any psychiatric or psychological problems or conditions." A patient's right to medical records is covered by many federal and state statutes. Federal law, HIPAA, generally preempts state law. 42 U.S.C. § 1320d-7(a)(i); 45 C.F.R. § 160.203; and *Byrne v. Avery Center for Obstetrics and Gynecology, P.C.*, 314 Conn. 433 (2014). State laws that provide more stringent privacy of individually identifiable information are not intended to be preempted by HIPAA. 45 C.F.R. § 160.203(b). HIPAA gives patients a right to access to protected health information from a covered entity health care provider. 45 C.F.R. § 164.524(a)(1). The three exceptions to the general right of access to records in HIPAA are (1) A

licensed health care professional has determined, in the exercise of professional judgment, that the access requested is reasonably likely to endanger the life or physical safety of the individual or another person; (2) a licensed health care professional has determined, in the exercise of professional judgment, that disclosure is reasonably likely to cause substantial physical harm to an individual mentioned in the records or to another person; and (3) the disclosure is reasonably likely to cause substantial harm to the individual or another person. 45 C.F.R. § 164.524(3)(i-iii). It is arguable that state law that provides less access to protected health information would be preempted by HIPAA.

The right of access to medical records is covered by the following federal regulations and state statutes:

1. HIPAA, 45 C.F.R. § 164.524, Access of Individuals to protected health information.
2. C.G.S. § 17a-548(b), Connecticut Patients' Bill of Rights applicable to any inpatient or outpatient hospital, clinic or other facility for the diagnosis, observation or treatment of persons with psychiatric disabilities.
3. C.G.S. § 4-104, Access to medical records after discharge from any private hospital, public hospital society or corporation receiving state aid.
4. C.G.S. § 19a-490b, access to medical records from any DPH licensed institution. C.G.S. § 19a-490b(d) provides for a fee waiver for those persons unable to pay.
5. C.G.S. § 20-7c, access to medical records from a provider, any person or organization that furnishes health care and is licensed to practice the healing arts.
6. C.G.S. § 52-146c (psychologists); C.G.S. § 52-146d-j (psychiatrists); C.G.S. § 52-146k (domestic violence counselor or sexual assault counselor); C.G.S. § 52-146o (physician, surgeon or health care provider); C.G.S. § 52-146p (marital and family therapist); C.G.S. § 52-146q (social worker); and C.G.S. § 52-146s (professional counselor). These provisions provide that communications and records are confidential and privileged by state law with certain exceptions.

The Patients' Bill of Rights, C.G.S. §17a-548(b), applies to records regarding psychiatric care. I would suggest that the language regarding access to more general medical records when there is an allegation that granting access would be "detrimental to the physical or mental health of the patient, or is likely to cause the patient to harm himself, herself or another" be modified so that it aligns with the requirements of access under the Patients' Bill of Rights, which applies specifically to psychiatric records and is more protective of a patient's right to access records, and therefore should not be preempted by federal law. That statute outlines that a facility may refuse to disclose any portion of the patient's record, only upon a finding that disclosure "(1) Would create a substantial risk that the patient would inflict life-threatening injury to self or to others or experience a severe deterioration in mental state; (2) would constitute an invasion of privacy of another person; or (3) would violate an assurance of confidentiality furnished to another person, provided only such portion of the record the disclosure of which would not constitute an invasion of privacy of another person or violate an assurance of confidentiality furnished to another person shall be disclosed." In the event that the facility makes such a

determination, the facility is still obligated to disclose parts of the record that would not create a substantial risk of life-threatening injury to self or others, invade another's privacy, or violate an assurance of confidentiality. Our concern is that the proposed amendment continues to include language with a potentially broader interference with a patient's right to access her medical records because it talks about a provider's determination that release of the records is simply "detrimental" to the patient's physical/mental health or "likely" to cause harm to self or others – as opposed to a substantial risk of life-threatening injury to self or others.

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